DATO' AMELDA MD DIN v. MAJLIS PEGUAM MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[ORIGINATING SUMMONS NO: WA-17D-1-01-2017]
22 FEBRUARY 2018

LEGAL PROFESSION: *Disciplinary proceedings – Procedure – Non-compliance with ss. 103C(1) and 103D(1) of Legal Profession Act 1976 – Failure by Disciplinary Committee ('DC') to record finding of facts which formed basis of findings and recommendation – Whether failure rendered decision fatally flawed – Whether decision null and void – Failure by Disciplinary Board to record reasons for rejecting recommendation of DC – Whether non-compliance of mandatory statutory provision – Whether decision ought to be set aside*

This was the appellant's appeal under s. 103E of the Legal Profession Act 1976 ('the LPA') seeking, *inter alia*, that the whole decision of the Advocates & Solicitors Disciplinary Board ('the DB') which affirmed the decision and/or findings of the Advocates & Solicitors Disciplinary Committee ('the DC') pertaining to the appellant's liability over the complaint made against the appellant and enhanced the fine imposed by the DC from RM5,000 to RM10,000 to be paid within one month from the date of DB's decision be set aside. The grounds raised by the appellant, amongst others, was the failure by the DB to record its grounds for the disagreement with the sentence imposed/proposed by the DC against the appellant in accordance with s. 103D(1) of the LPA 1976. Hence, the issue considered by the court in the present appeal, *inter alia*, was pertaining to the non-compliance with ss. 103C(1) and 103D(1) of the LPA by the respondent.

Held (allowing appeal with no order as to costs):

(1) The word 'shall' in s. 103C(1) of the LPA is mandatory, in that, the DC is under an obligation to record its finding of facts, which form the basis of its findings and recommendation. Without recording the findings of facts, it would be difficult for the DB to review the findings and recommendation of the DC in order to agree or disagree with the DC's findings and recommendation. The DC failed to comply with the mandatory requirement of sub-s. 103C(1) by failing to make an evaluation of the facts in order to make a finding and subsequent recommendation to the DB. Therefore, the decision of the DC was fatally flawed which rendered it null and void and, since the DB had acted on the DC's decision which was null and void, the decision of the DB must be set aside (paras 18, 19 & 25-28)

(2) Section 103D(1) of the LPA makes it mandatory for the DB to record the reasons if it rejects the findings or recommendation made by the DC. However, the section does not make any distinction between 'finding'

A or 'recommendation'. There was nothing to show that the DB had recorded the reasons for rejecting the recommendation of the DC in imposing the RM5,000 fine. Further, the increment of the fine from RM5,000 to RM10,000 was a rejection of the DC's recommendation, and therefore, it fell within sub-s. 103D(1) of the LPA 1976. Based on
B the non-compliance with the statutory provision, the decision of the DB must be set aside. (paras 32, 33, 35 & 37)

Case(s) referred to:
Bar Malaysia v. Neasarani T Singara Thevar & Anor [2015] 8 CLJ 634 CA ***(refd)***
Batu Malay Thandy v. Saulinardi & Anor [2015] 1 CLJ 33 CA ***(refd)***
C *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 4 CLJ 265 FC* ***(refd)***
Liaw Chee Huey v. Wong Chin Heon [2015] 7 CLJ 485 HC ***(refd)***
Majlis Peguam Malaysia v. Rajehgopal Velu & Anor [2017] 2 CLJ 493 FC ***(refd)***
Ramasamy Amaippan v. Kwan Lee Pin (Majlis Peguam Malaysia, Intervener) [2018] 3 CLJ 336 CA ***(refd)***

D **Legislation referred to:**
Legal Profession Act 1976, ss. 103C(1), 103D(1), (2), (4), 103E
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, rr. 8, 24

E *For the appellant - K Selva Kumaran; M/s GK Ganesan*
For the respondent - Shalini Ragunath; M/s Rose Hussin

Reported by S Barathi

JUDGMENT

F **Azizah Nawawi J:**

Application

[1] This is the appellant's appeal under s. 103E of the Legal Profession Act 1976 ("LPA 1976") seeking the following prayers:

G (i) That the whole decision of the advocates & solicitors disciplinary board ("DB") dated 10 December 2016 which affirms the decision and/or findings of the advocates & solicitors disciplinary committee ("DC") dated 1 August 2014 pertaining to the appellant's liability over the complaint made against the appellant and enhanced the fine imposed by
H the DC from RM5,000 to RM10,000 to be paid within one month from the date of DB's decision (the decision) be set aside; and

(ii) That the fine of RM10,000 paid by the appellant to the respondent to be refunded to the appellant.

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[2] The grounds of the appeal are:

(i) The DC and/or the DB has erred in law when they failed to apply the correct principles of law pertaining to the burden of proof for the complaint against the appellant ie, beyond reasonable doubt.

(ii) The DC and/or the DB had erred in law in accepting the "evidence" and/or documents contained in the record of complaint without calling any witness to give evidence on behalf of the respondent, including the original complainant ie, Seong Siew Poh.

(iii) The appellant was not given a chance and has been denied her rights to cross-examine any of the respondent's witness.

(iv) The DC and/or the DB has failed to frame specific charges against the appellant pertaining to the respondent's complaint which amounted to a breach of procedural fairness.

(v) The DC and/or the DB has failed to identify, state and refer to the specific provisions of law which contained the 'offence' that the appellant had been charged/complained with in which the appellant was found guilty.

(vi) The whole proceedings before the DC and the DB pertaining to the complaint against the appellant is inconsistent with the principle of natural justice.

(vii) The DB failed to record its grounds for the disagreement with the sentence imposed/proposed by the DC against the appellant in accordance to s. 103D(1) of the LPA 1976.

(viii) The DC and/or the DB failed to inform and/or give notice and/or record the DC's findings over the complaint as provided under s. 103C(1) and s. 103D(4) of the LPA 1976.

(ix) The DC and/or the DB has erred in facts and law in failing to make findings that the appellant has the right to withhold the sum of RM138,650.67 as a lien towards the settlement of the appellant's legal fees in handling 96 judicial review cases for the Living Stones Development Sdn Bhd (as agreed by the original complainant ie, Seong Siew Poh as the Director of Living Stones Development Sdn Bhd)

(x) The DB had erred in law and facts when they failed to make findings that at all the material times, the appellant has no intention to illegally withhold the sum of RM138,650.67 and has no element of dishonesty against the original complainant ie, Seong Siew Poh.

[3] Having considered the appeal and the submission of the parties, this court has allowed the appeal on the following grounds:

(i) Non-compliance with sub-s. 103C(1) of the LPA 1976;

(ii) Non-compliance with sub-s. 103D(1) of the LPA 1976.

The Salient Facts

[4] The original complainant, Seong Siew Poh ("Mr Seong"), is the director of a development company known as Living Stones Development Sdn Bhd (LSD). On or around July 2006, Mr Seong has appointed the appellant's legal firm to represent LSD in 96 judicial review applications from one decision of the housing tribunal (the "judicial review applications"). LSD and the appellant have agreed that the fees for each file would be RM500, totaling RM48,000. This agreement is evidenced by the appellant's letter dated 23 July 2007.

[5] Mr Seow then appointed the appellant to act as a solicitor in a sale and purchase agreement ("SPA") between Zalina binti Mohamed ie, the owner of the house who filed the complaint to the housing tribunal and one Elanggo a/l Kuppusamy, a third-party buyer. The SPA was not prepared by the appellant nor the appellant's firm.

[6] The property had to be redeemed from bahagian pinjaman perumahan, Perbendaharaan Malaysia for the sum of RM138,650.57 before 31 August 2006. On 28 August 2006, Mr Seow had sent a cheque in the sum of RM138,650.57 into the appellant's clients' account for the redemption of the property. However, the said cheque was only cleared on 1 September 2006, and the redemption failed. The parties then terminated the SPA on 25 January 2007.

[7] By a letter dated 14 May 2008, Mr Seow and the appellant came to an agreement to increase the fees for the judicial review applications to RM1,000 per file, with a total fee of RM96,000.

[8] Sometime in September 2010, Mr Seow went to the appellant's office and informed the appellant that since the redemption sum for the said property has been made *via* Mr Seow's personal cheque and not LSD's cheque, thus for the purpose of regularising LSD's account and on LSD's accountant's advice, Mr Seow requested for the said redemption sum to be returned to him in exchange for LSD's cheque to the appellant's firm for the same amount. The appellant did not have any objection towards the said request on the condition that Mr Seow undertook to issue and forward the said LSD's cheque. The appellant's firm then issued a cheque for the sum of RM10,150.67 and a post-dated cheque dated 25 October 2010 for the sum of RM128,500 to Mr Seow.

[9] However, despite having received both cheques, Mr Seow and LSD failed to discharge their obligation towards the appellant/appellant's firm. Thus, the appellant instructed the firm's bank to stop the payment for the sum of RM128,500 and retain the same as lien towards the settlement of the appellant's legal fees and disbursement for the said judicial review applications.

[10] *Vide* a letter of complaint dated 1 August 2014, Mr Seow lodged a complaint against the appellant with the respondent, alleging that the appellant had without authorisation, retained the redemption sum amounting to RM138,650.57 after the SPA was terminated and that the appellant failed to keep Mr Seow informed of the status of the judicial review applications.

[11] The complaint against the appellant was fixed for hearing on 20 November 2015 but on the same date, the appellant and Mr Seow had reached an amicable settlement which resulted in the withdrawal of the complaint. Nevertheless, despite the withdrawal of the said complaint, the respondent decided to proceed with the complaint pursuant to r. 8 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 (the "1994 Rules"). The complaint was proceeded with and was fixed for hearing on 20 May 2016 whereby the respondent had acted as the complainant. During the hearing before the DC, no witness was called to testify on behalf of the respondent.

[12] Subsequently, the DC found the appellant guilty and made a recommendation to the DB that the appellant be fined RM5,000. *Vide* letter dated 31 October 2016, the DB informed the appellant that the DB has affirmed the finding of liability made by the DC but disagreed with the DC's recommendation on the fine of RM5,000. Therefore, the DB then fixed the matter for hearing of mitigation on 10 December 2016.

[13] On 10 December 2016, upon hearing the appellant's counsel submission, the DB enhanced the fine imposed by the DC from RM5,000 to RM10,000 which is to be paid within one month from the date of the said decision. The appellant paid the said fine on 6 January 2017 whilst reserving her right to appeal against the said decision.

[14] Hence, the appellant then filed this present action to challenge the DB'S decision dated 10 December 2016.

The Findings Of The Court

[15] The first issue for consideration is whether the respondent has failed to comply with s. 103C of the LPA 1976, which reads:

> 103C. Findings and recommendations of the Disciplinary Committee
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> (1) **Upon conclusion of the inquiry, a Disciplinary Committee shall record its findings in relation to the facts of the case and according to those facts shall determine** and make any one of the following recommendations to the Disciplinary Board:

(a) that no cause for disciplinary action exists and that the application or complaint be dismissed;

(b) that cause for disciplinary action exists but is not for sufficient gravity to warrant any punishment other than a reprimand or censure or that the circumstances ae such that the advocate and solicitor should only be reprimanded or censured; or

(c) that cause for disciplinary action exists and is of sufficient gravity to warrant the advocate and solicitor to be subject to one or more of the following penalties or punishments:

(i) reprimand or censure;

(ii) imposition of a fine not exceeding fifty thousand ringgit;

(iii) suspension of the advocate or solicitor from practice, or in the case of a foreign lawyer, recommendation to the Bar Council for suspension of registration, for such period not exceeding five years as the Disciplinary Committee deems appropriate in the circumstances; or

(iv) striking the advocate and solicitor off the Roll or in the case of a foreign lawyer, recommendation to the Bar Council for revocation of the registration of the foreign lawyer. (emphasis added)

[16] The issue here is whether the above provision is mandatory and that failure to comply with the same renders the proceeding before the DC to be in breach of a statutory provision and is therefore null and void.

[17] As this involves a statutory interpretation, the Federal Court in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265 held that that one of the basic principle in construing an Act of Parliament to be as follows:

> [52] The function of a court when construing an Act of Parliament is primarily to interpret the statute in order to ascertain what the legislative intent is. And this is primarily done by reference to the words used in the provision. *Craiese on Legislation* (9th edn, 2008) at p. 611 states:
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> > The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the court is to interpret legislation "according to the intent of them that made it" and that intent is to be deduced from the language used.

[18] From the reading of s. 103C(1) of the LPA 1976, I am of the considered opinion that the intention of Parliament in enacting this provision is that the DC is to record its findings of facts which will form the basis of its recommendation to the DB. The DC may make any of the recommendation in para. (a), (b) or (c), and these recommendations are distinct from each other which the DC is given the discretion to make,

depending on the factual matrix of each case. Without recording the findings of facts which forms the basis of the DC's recommendation to the DB, it will be difficult for the DB to review the findings and recommendation of the DC in order whether to agree or disagree with the DC's findings and recommendation under s. 103D of the LPA 1976. From the decision of the DB, the aggrieved party has a right to appeal to the High Court under s. 103E. Without the DC's recording of the findings of facts, it will also be difficult for the court to ascertain whether the DC has made a proper finding and recommendation to the DB. Added to that, the aggrieved party has a legal right to know the basis of the DC's finding and recommendation to the DB, in order to enable him to challenge the same.

[19] Therefore, I am of the considered opinion that the word 'shall' in s. 103C (1) is mandatory, in that the DC is under an obligation to record its finding of facts, which forms the basis of its findings and recommendation. This is supported by the decision of the Court of Appeal in *Bar Malaysia v Neasarani T Singara Thevar & Anor* [2015] 8 CLJ 634, where the court held that:

> Disciplinary actions are quasi penal in nature. Procedural fairness in such proceedings is part of constitutional guarantees under the Federal Constitution.

[20] In *Liaw Chee Huey v. Wong Chin Heon* [2015] 7 CLJ 485; [2016] 7 MLJ 95, the court held as follows:

> [66] ... The disciplinary proceedings against the appellant are governed by the provisions in Part VII of the LPA 1976 which clearly provide the procedure on how to conduct an investigation into a complaint of misconduct lodged by the respondent.
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> This court is always cautious when entertaining an appeal against the decision of the ASDB which was entrusted to decide on the fate of their fellow practitioners on matters of discipline. The court is always mindful that the ASDB which is entrusted with the supervision of advocates and solicitor's conduct should know and appreciate better than anyone else the standard of conduct expected of the legal profession: *Au Kong Weng*'s case, *supra*. Hence the court will not interfere with the merits of decision of the ASDB.
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> *However, since this is a disciplinary matter entrusted to ASDB governed by the provision of LPA 1976, the court will look into the decision making process of ASDB to ensure that it has followed the procedure laid down and complied with the minimum standards consistent with the administrative good governance*. Categories of such minimum standards are, among others:
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> (a) the decision making body shall not act *ultra vires* its power prescribed by the statute governing it;
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> (b) it shall act within its jurisdiction;

(c) it shall not commit any form of error of law material to the decision;

(d) it shall address relevant considerations and not address irrelevant considerations;

(e) it shall comply with the rules of natural justice that is, the right to be heard on the part of the aggrieved person and the right to an impartial tribunal. (emphasis added)

[21] In *Ramasamy Amaippan v. Kwan Lee Pin (Majlis Peguam Malaysia, Intervener)* [2018] 3 CLJ 336; [2017] MLJU 783, the Court of Appeal held that the word 'shall' in r. 24 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 is mandatory and requires strict compliance by the DC. The court held as follows:

[28] Rule 24 of the Legal Profession (Disciplinary Proceedings) (investigating Tribunal and Disciplinary Committee) Rules 1994 provides as follow:

24 Record of proceedings before Disciplinary Committee

The Disciplinary Committee shall make a record of all the evidence given before it.

[29] **Strict compliance of Rule 24 is required**. The DC is not a final arbiter of the dispute created by the lodging of the complaint. It investigates the allegation by hearing witnesses acquainted with the complaint lodged and at the end of that exercise it recommends actions to be taken against the errant advocate and solicitor, depending on the outcome of the investigation. *Whatever its decision at the end of the investigation upon which its recommendations to the DB are premised, the DC must act on the evidence given by the various witnesses. Therefore, it is imperative that it keeps a proper record of what had transpired before it in terms of the testimonies of the witnesses. The DC's recommendations are subject to review by the DB who will definitely be interested to see the evidence of witnesses in cases where it may not agree with the recommendations made by the DC. The High Court may also want to see how the decisions are arrived at by the DB. It will be extremely difficult to verify the challenges made by the aggrieved parties pertaining to what had transpired at the DC hearing when there is insufficient record of the proceedings to substantially reflect what had transpired during the DC proceedings, before the review or appeal tribunal*.

[30] What we had in the Record of Appeal among others, had been the Report of the DC of the hearing into the complaint. It was apparent that the members had certified a summary of events as to what had transpired during the hearing. There was no *verbatim* recording of the evidence of the various witnesses, in particular that of the Appellant. No mention was made of the issue pertaining to the denial of cross-examination to the Appellant. A verbatim record of the proceedings would have taken care of the matter by referring to the record of the proceedings as recorded by the DC. If the contemporaneous records show that there was no such request ever being made by the Appellant, a short shrift could be made

of it and that would be the end of the matter. Indeed, if there be such a record, no allegation of this kind could have surfaced. But there was nothing in the report by the DC to the DB that had indicated such a request was made but, for some reason was denied by the DC or for that matter, an observation was made by the DC that the Appellant did not make any request to cross examine the Respondent. The fact that the affidavit affirmed by the Secretary of the Bar Council, Ms Karen Cheah adverting to the matter in paragraph 12 of her Affidavit-in-Reply to the Appellant's OM by referring the matter on cross-examination to the members of the DC, did not help in any way. The significance of complying with rule 24 cannot be overstated. Hence, the mandatory dictate in which rule 24 has been couched in its choice of language that was employed therein. There is much wisdom underlying that provision. The perils that may ensue, as a result of its non-compliance, in our considered view, have been clearly amplified in this appeal before us.

[31] **We found that there was non-compliance of Rule 24 and that it had thereby compromised the decision-making process of the DC**. The failure of the learned High Court Judge to deal with this crucial issue in her Grounds of Judgment amounted to an error of law leading to a decision which in our respectful view, is untenable. That must require our appellate intervention. (emphasis added)

[22] Therefore, it is very clear that sub-s. 103C (1) of the LPA 1976 makes it mandatory for the DC to 'record its findings in relation to the facts of the case and according to those facts shall determine and make any one of the following recommendations to the ...' DB.

[23] The DC report, the "record of investigation proceedings", includes, *inter alia*, a 'Summary of the complaint', the 'lists of exhibits and correspondence submitted to the disciplinary committee', 'notes of evidence', examination and cross examination of the respondent (appellant), 'submission by the respondent's counsel', 'submission by the representative of the Bar Council' and finally 'reply by the respondent's counsel'.

[24] Then the "report of the disciplinary committee" reads:

1. The Committee's finding of liability.

We find that the Respondent is liable to the complaint made by the Complainant.

2. The Committee's recommendation

Taking into account that the Complainant last 20th November 2015 agreed to withdraw his complaint against the Respondent and an amicable settlement of RM93,292.00 (RINGGIT MALAYSIA: NINETY-THREE THOUSAND TWO HUNDRED NINETY-TWO) was accepted by the Complainant from the Respondent;

We recommend for disciplinary action as per Section 103C (1)(c)(i) of the Legal Profession Act, 1976 (Act 166) where an imposition of fine of RM5,000.00 (RINGGIT MALAYSIA: FIVE THOUSAND) only, upon the Respondent.

[25] From the report of the DC dated 20.5.2016, I am of the considered opinion that the DC has failed to comply with the mandatory requirement of sub-s. 103C (1) by failing to make an evaluation of the facts in order to make a finding and subsequent recommendation to the DB.

[26] On the issue of liability, the DC merely makes a finding "that the respondent is liable to the complaint made by the complainant". There is no evaluation of the facts to support the finding of liability by the DC. Without such evaluation and findings of facts, how is the DB going to decide whether to agree or disagree with the findings and recommendations of the DC. Consequently, how is the aggrieved party going to challenge the findings of the DC and how will the court make a decision on appeal if the DC's statutory duty is reduced to such a simplistic finding. Such a lackadaisical attitude of the DC must not be tolerated as this involves the livelihood of members of the Bar.

[27] Learned counsel for the respondent agreed that failure of the DC to make the evaluation is flawed but not fatally flawed. However, I am of the considered opinion that since there is non-compliance with the mandatory statutory requirements, the decision of the DC is fatally flawed which renders it null and void.

[28] I am therefore of the considered opinion that since the DB had acted on the DC's decision which is null and void, then the decision of the DB must be set aside.

[29] At the same time, I am also of the considered opinion that the DB's decision must be set aside as the decision is in breach of s. 103D(1) of the LPA which provides that if the DB reject the findings or recommendations of the DC, the DB shall record the reasons for the rejections. Section 103D of the LPA 1976 reads as follows:

> 103D. Consideration by the Disciplinary Board of the report of the Disciplinary Committee.
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> (1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee and if the **Disciplinary Board rejects the findings or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason for the rejection**."
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> (2) The Disciplinary Board may in appropriate cases impose a greater or lesser penalty or punishment than that recommended by the Disciplinary Committee.
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> (3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other orders as it deems just.

(4) Before the Disciplinary Board makes an order that is likely to be adverse against an advocate and solicitor under subsection (2) or (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

(5) Where the Disciplinary Board makes an order that the advocate and solicitor should make restitution to the complainant, it may stipulate the time within which such restitution ought to be made.

(6) A sum ordered by the Disciplinary Board under subsection (5) to be restituted may be recoverable by the complainant as a civil debt. (emphasis added)

[30] In the case of *Batu Malay Thandy v. Saulinardi & Anor* [2015] 1 CLJ 33; [2015] 2 MLJ 364, the Court of Appeal makes this comment at p. 42 (CLJ); p. 371 (MLJ):

[18] We agreed with the decision of the learned High Court judge that the DB was not bound to follow the findings and recommendations made by DC by virtue of s 130D(3) of the Act and there is no general duty to give reasons for its decision as there is no statutory obligation to do so. Whilst we say this, we noted that s 103D(1) has been subsequently amended *vide* the Legal Profession (Amendment) Act 2012 (Act A 1444) and brought into force on 3 June 2014 *vide* PU(B) 262 of 2014 wherein the words 'and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason for the rejection' were inserted after the words recommendation of the Disciplinary'. So this issue is put to rest.

[31] The Federal Court in the case of *Majlis Peguam Malaysia v. Rajehgopal Velu & Anor* [2017] 2 CLJ 493; [2017] 1 MLJ 596 has looked at this new provision and said as follows:

[58] The facts relating to this issue from the records of the proceedings are not in dispute, i.e., the **DB has not given any reasons for rejecting the DC's recommendation and enhancing the suspension period from six months as recommended by the DC to 12 months**. Learned counsel for the first respondent contended that the DB had exceeded its power for failing to give reasons and therefore the order as to the suspension period must fall. Learned counsel relied on the current provisions of s. 103D(1) of the LPA which in effect provides that "*After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason for the rejection*."

[59] We agree that under the *current provisions of s. 103D(1) of the LPA, the DB shall record the reasons if it rejects the recommendation made by the DC. It is a mandatory requirement. However, it must be noted that the said requirement was only inserted into the section by an amendment to the LPA vide the Legal Profession (Amendment) Act 2012 (Act A1444) which came into effect on 3 June 2014 vide P.U. (B) 262/2014.* There was no indication that the amendment was to take effect retrospectively.

A [60] The disciplinary proceedings on the matter before the DB was conducted on 16 May 2014 (prior to the effective date of the amendment to s. 103D(1) of the LPA). *The suspension order was also made on 16 May 2014. At that time, there was no statutory requirement in s. 103D(1) or other provisions of the LPA which required the DB to give and to record its reason if it chooses to reject the recommendation made by the DC.* There was no statutory
B duty or obligation to do so. Therefore, the DB cannot be said to have exceeded its power for failing to give reasons for its rejection of the DC's recommendation. (emphasis added)

[32] Therefore, the new s. 103D(1) of the LPA 1976 makes it mandatory for the DB to record the reasons if it rejects the findings or recommendation
C made by the DC. This is a statutory duty imposed by the new amendment.

[33] In the present case, there is no dispute that the DB had rejected the recommendation of the DC in imposing the RM5,000 fine. It subsequently increased the fine to RM10,000. However, there is nothing before this court to show that the DB has recorded the reasons for the rejection of the
D recommendations of the DC in imposing a fine of only RM5,000. Since the DB has failed to comply with this mandatory statutory requirement, then the decision of the DB must also be set aside based on non-compliance with the statutory provision.

E **[34]** However, the respondent submits that:

(i) That the increment of the fine from RM5,000 to RM10,000 is not a rejection of the DC's recommendation. Thus, the DB does not have to provide grounds for the same.

F (ii) That s. 103D(1) of the LPA 1976 requires the DB to 'record reasons' if it 'rejects the DC's finding or recommendation'. There are three ways in which the DB can 'reject' the findings or recommendation of the DC: in relation to guilt (1), in relation to restitution (2) and in relation to the severity of punishment (3). Section 103D (2) of the LPA 1976 gives the DB the power to impose 'a greater or lesser penalty' than is
G recommended by the DC. That power is not subject to s. 103D (1). That is to say, if the DB wishes to impose a greater or lesser penalty that is recommended by the DC, it is not required to provide written grounds for the same.

H (iii) That the DB has given its reasons in the order dated 10 December 2016, which reads:

> In exercise of the powers conferred by Section 103D of the Legal Profession Act 1976 (the Act), the Disciplinary Board having affirmed the finding of liability by the Disciplinary Committee but disagreed with its recommendation on punishment against the
I Respondent in view of the seriousness of the misconduct, taking into account the large sums of monies involved and the long

> period of approximately 9 years in which the Respondent had wrongly withheld the redemption sum, and having considered the written submission .. and hearing the Respondent …, pursuant to Section 103D (2) and Section 103D (4) of the Act, IT IS HEREBY ORDERED pursuant to Section 103D (1), Section 103D (2) and Section 103D (4) that the Respondent do pay a penalty of Ringgit Malaysia Ten Thousand only (RM10,000.00) payable to the Discipline Fund within one (1) month from the date of this Order AND N DAEFAULT THEREOP the Respondent shall be suspended pursuant to Section 103(1) of the Act from practice as an Advocate and Solicitor until payment of the penalty.
>
> ...".

[35] With regards to issue (i), I am of the considered opinion that increment of the fine from RM5,000 to RM10,000 is a rejection of the DC's recommendation, therefore it falls within sub-s. 103D(1) of the LPA 1976.

[36] With regards to issue (ii) raised by the respondent, I am of the considered opinion that the Federal Court *Majlis Peguam Malaysia v. Rajehgopal a/l Velu & Anor (supra)* has interpreted this specific provision, in that under "s. 103D (1) of the LPA 1976, the DB shall record the reasons if it rejects the recommendation made by the DC. It is a mandatory requirement".

[37] With regards to issue (iii), s. 103D(1) does not make any distinction between 'finding' or 'recommendation'. The statutory requirement is that the DB must record the reason for rejecting the finding or recommendation of the DC. Therefore, the reasons for rejecting the finding or recommendation of the DC must be notified to the advocate and solicitor so that the advocate and solicitor be given a reasonable opportunity to be heard pursuant to sub-s. 103D(4).

[38] As conceded by the respondent, the DB has only given its reasons for rejecting the DC's recommendation of the RM5,000 fine in the order dated 10 December 2016. This is clearly contrary to sub-s. 103D(1) read with sub-s. 103D(4), which requires the DB to record the reasons for the rejection, and subsequently to notify the advocate and solicitor of the same before giving him a reasonable opportunity to be heard. Indeed, the letter dated 31 October 2016 issued by the respondent pursuant to s. 103D(2) and s. 103D(4) of the LPA 1976 did not give the reasons of the DB in rejecting the recommendation of the DC. The said letter reads:

> 1. We write to inform you that the Disciplinary Board has its meeting held on 13 October 2016 considered the Report of the Disciplinary Committee on the complaint against you. The Board affirmed the finding of liability by the Disciplinary Committee but disagreed with the recommendations with regards to punishment on you.

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2. NOTICE is hereby given in accordance with section 103D (2) and Section 103D(4) of the Legal Profession Act 1976 that you appear before the Disciplinary Board on 10 December 2016 at 9.00 am in the premises of the Board on the 8th Floor, Wisma Maran, 28 Medan Pasar, 50050 Kuala Lumpur to make your representations to the Board before the Board decides on the appropriate order to make.

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[39] In the circumstances and for the reasons enumerated above, this appeal is allowed with no order as to cost.

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